



February 26, 2003

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The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Sensenbrenner:

Thank you for your letter of January 30, 2003. You have raised several important questions regarding LSC regulations that deal with the outside practice of law by full-time legal services attorneys and the financial eligibility of clients receiving LSC-funded services. As you may know, LSC's Board of Directors, upon my recommendation, deferred any action on these two regulations at its recent meeting until we were able to provide you with information relating to your specific concerns. I would like to take this opportunity to respond to your letter.

With respect to the proposed regulation on the Outside Practice of Law, 45 CFR Part 1604, you express concern that proposed section 1604.5 (b) and (c) would, if adopted, be contrary to the statutory restriction on claiming, collecting or retaining attorneys' fees. We agree completely. We expressly addressed this matter in the preamble to the proposed rule:

The 1995 NPRM contained a new proposed provision on compensation, providing, among other things, that a recipient would be allowed to permit an attorney to accept attorneys' fees for certain cases, as long as the fees would be remitted to the recipient. While this proposed provision was clearly permissible at the time it was proposed, LSC is concerned that it is no longer consistent with the current statutory and regulatory restrictions on the claiming, collecting and retention of attorney's fees. In order to solicit comment on this issue, LSC is reprinting the original text of the preamble and the proposed regulatory text as they appeared in 1995.

In further reviewing the matter, we determined that the provisions on compensation proposed originally in 1995 were, indeed, inconsistent with the statutory prohibition on claiming, collecting and retaining attorneys' fees. The comments from both the Office of the Inspector General and representatives of our grantees also supported this

conclusion. The draft Final Rule that was to have been presented to the Board for consideration no longer contains those provisions. In fact, the preamble to that draft Final Rule addresses this issue:

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With respect to LSC's rules on financial eligibility, 45 CFR Part 1611, we understand you to have two concerns. First, you suggest that the standards for the documentation of eligibility of group clients would be vague, and that as a result, the rule would appear to be insufficient to ensure that ineligible individuals do not receive representation. We respectfully disagree.

We certainly agree that the LSC-funded legal assistance is to be reserved for eligible persons and that is why the section 1611.3 (b), as proposed provides that:

As part of its financial eligibility policies, every recipient shall specify that only individuals and groups determined to be financially eligible under the recipient's financial eligibility policies and LSC regulations may receive legal assistance supported with LSC funds.

We also note that the aspects of the rule relating to representation of groups of individuals are, in essence, codified versions of the current and long-standing practice relating to financial eligibility and representation of groups primarily composed of eligible individuals. We hasten to point out that, to date, the eligibility of these groups has not proven to be problematic in the ways you appear to anticipate and we do not see why it would prove any more problematic in the future. Moreover, in many, if not most, instances a "group," even a group comprised of individual members, is something more than a collection of individuals, and the group, as a client, may have legal needs that are not the same as the legal need of a particular member of the group. Thus, we believe that the incidence of an individual deemed financially ineligible and denied service who then receives the same legal assistance he or she had previously been denied simply because that person has become a member of a group has, again, been rare or non-existent based upon our many years of experience. We believe that the risk of such occurrences in the future is unlikely to be greater under the revised rule as proposed.

You have also raised questions relating to the determination of eligibility for groups which have as a primary function, the delivery of services to, or furtherance of the interests of, those who would be financially eligible for legal assistance. In these circumstances, the organization seeking assistance would be the client and organization, and under the proposed regulation would have to demonstrate that the

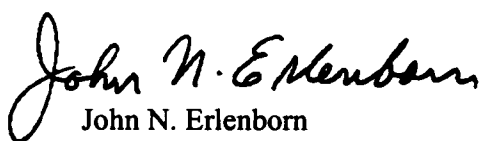
organization itself does not have the means to afford private representation and that the organization lacks the ability to obtain the means to afford such private counsel. Thus, in this situation, the recipient could only provide LSC-funded legal assistance to the organization if the organization demonstrated its financial eligibility. Further, in these instances, the recipient would not be providing legal assistance to financially ineligible individuals.

You also expressed concern about the proposal to eliminate the retainer agreement requirement that appears in the current version of Part 1611. You state that the existing retainer agreement requirement is consistent with the Corporation's authority under the LSC Act. We agree that there are many circumstances in which retainer agreements are appropriate and that LSC has the authority to require recipients to execute retainer agreements. However, nothing in the LSC Act or the Appropriations Act provisions requires that recipients obtain retainer agreements. We believe that recipients will find it in their own best interest to determine how and when they will memorialize their relationships with their clients, in accordance with applicable obligations under local rules of professional responsibility. As such, we do not believe that the additional administrative burden of requiring retainer agreements *by regulation* is necessary or a good use of grantees' limited resources.

Your letter also notes the contention of the OIG that, by including retainer agreements in the list of documents covered by 509(h), Congress was indicating that it believed recipients were required by statute to obtain retainer agreements. We respectfully disagree with the OIG on this point. Rather, we believe that Congress was cognizant that (1) obtaining retainer agreements is often a fairly standard practice and, in instances may be required by local rules of professional responsibility and (2) under its regulations, LSC was already requiring the execution of retainer agreements in certain instances. Consequently, Congress expected that recipients would often have executed retainer agreements in their clients' files and was indicating that the OIG should have access to them when they exist.

I hope this letter addresses the questions and concerns you have about the two proposed regulations. LSC's Board Directors will continue to ensure that all LSC policies and regulations adhere to the spirit of the LSC Act. Additionally, the Board is fully committed to ensuring that all federal grantees remain in compliance with Congressional restrictions and applicable laws. The LSC Board will reconvene within the next two months to continue in the process concerning these two regulations. Please do not hesitate to contact me directly at (202) 336-8820 should have you any further questions or wish to discuss these matters in more detail.

Sincerely,


John N. Erlenborn
President